Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY LEVENSON, HARRY GORDON and FRANK PERNICE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Whether the trial court committed reversible error in its jury charge by:

(a) marshalling the evidence after a specific representation to the contrary, thereby misleading counsel in the preparation of their summations;

(b) marshalling the evidence in a wholly unbalanced manner, by emphasizing only the most prejudicial evidence presented by the government; and

(c) denigrating the defense theory of the case by giving an erroneous instruction on willfulness.

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Larry Levenson, Harry Gordon, Frank Pernice, petitioners herein, and Alan Feinberg.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties to the Proceeding i

Opinion Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved ... 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT—The Trial Court's marshalling of the evidence, after affirmatively representing to the contrary, marshalling in a wholly unbalanced manner and erroneously instruction of willfullness was reversible error .. 8

A. The Court's Misinforming Counsel as to Marshalling the Evidence 9

B. Trial Court's Failure to Marshal the Evidence Fairly 12

C. Trial Court's Misstatement of the Defense Theory of the Case 18

Conclusion 25

Appendix A 26

Appendix B 30

PAGE

Bollenbach v. *United States*, 326 U.S. 612 18

Herring v. *New York*, 422 U.S. 853 (1975) 11

Strauss v. *United States*, 376 F.2d 416 (5th Cir. 1967) 18, 24

United States v. *Alfonso Perez*, 535 F.2d 1362 (2d Cir. 1976) 12, 18

United States v. *Bernstein*, 533 F.2d 775 (2d Cir. 1976) 3

United States v. *Fincke*, 437 F.2d 856 (2d Cir. 1971) 11

United States v. *Hyde*, 448 F.2d 815 (5th Cir. 1971) .. 3

United States v. *Levy*, 578 F.2d 896 (2d Cir. 1978) .. 12

United States v. *O'Connor*, 237 F.2d 466 (2d Cir. 1956) 18

United States v. *Platt*, 435 F.2d 789 (2d Cir. 1970) .. 18

United States v. *Taylor*, 562 F.2d 1345 (2d Cir. 1977) 8

STATUTES AND RULES CITED

Amendments to the United States Constitution

Fifth 2

Sixth 2

18 U.S.C. § 371 2

26 U.S.C. § 7201 2

§ 7206(1) 2

§ 7206(2) 2

28 U.S.C. § 1254(1) 1

Internal Revenue Code

§ 501 5

Rule 20.1, Supreme Court Rules 1

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Larry Levenson, Harry Gordon and Frank Pernice respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Kaufman, Timbers and Meskill, JJ.) (Appendix, *infra*), is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

Title 26 United States Code § 7201.

Title 26 United States Code § 7206(1).

The pertinent text of the foregoing provisions is set forth in the Appendix, *infra*.

Statement of the Case

Petitioners were convicted after a jury trial before the United States District Court for the Southern District of New York (Palmieri, J.) of conspiracy to defraud the Internal Revenue Service with regard to corporate income tax, in violation of 18 U.S.C. § 371; evasion of corporate income tax, in violation of 26 U.S.C. §§ 7201 and 7206(2); and two counts each of evasion of individual income tax, inviolation of 26 U.S.C. § 7201. In addition, Levenson and Gordon were convicted on three counts of filing false corporate income tax returns, in violation of 26 U.S.C. § 7206(1). Petitioners were sentenced to eight year terms of imprisonment as well as fined and taxed the costs of prosecution. The convictions were affirmed by the United States Court of Appeals for the Second Circuit.

Indictment No. 81 Cr. 56, filed in the Southern District of New York on February 5th, 1981, charged Larry Levenson, Harry Gordon, Frank Pernice and co-defendant Alan Feinberg with eleven counts of corporate and individual income tax evasion and filing false corporate income tax returns over the period of September 1977 through the date of the indictment. The indictment charged the four co-defendants with engaging in a conspiracy to defraud the Internal Revenue Service with

respect to the corporate income tax liability of Plato's Retreat, Inc., a private club owned by defendant Levenson.

The government's case was presented principally through the testimony of three former employees of Plato's Retreat—Anne Grippo, Charles Grippo and Fran Kaplan—and Revenue Agent William Davidson of the Internal Revenue Service.

Anne Grippo testified that she had worked as Volunteer Manager under her husband Charles at Plato's from February 1977, when it was housed at the Ansonia Hotel, until August 19th, 1980, when she and her husband both were fired (T 171-174). Her job, as manager, was to order and pay for food and supplies and to take care of the cash payroll (T 182).

Mrs. Grippo described the method by which patrons were admitted to the Club upon the payment of a cash fee at the door (T 182-183). Upon their admission, the patrons' names were written down by the club's cashiers on door register sheets, from which the computations of cash receipts were later made (T 186-197). Thereupon, at the end of each evening, the monies received were placed in envelopes and then in a safe (T 190-197). According to Mrs. Grippo, the gross weekly earnings at Plato's were approximately $25,000 to $30,000, of which $10,000 was deposited in the Club's bank acounts (T 215-219).

On Tuesdays, according to Mrs. Grippo, defendants Gordon, Levenson and Pernice would have weekly closed meetings relating to the affiairs of the Club (T 249-252). Levenson and Gordon were business partners (T 252-253) and she told the I.R.S. that Pernice received ten percent (10%) of the gross (T 246). All the books and records of Plato's were kept by Fran Kaplan, who was the bookkeeper from 1977 to 1979, and who kept the records at her apartment (T 266). According to Mrs. Grippo, defendant Gordon used to remove the door register sheets from Plato's.

Charles Grippo, with his wife a Manager of Plato's (T 388-389), testified that defendants Levenson and Gordon were equal partners and that defendant Pernice received ten percent (T 390-391). He described the method by which the customers paid monies to the cashiers upon admission and how these items would be reconciled at the end of each evening, with Fran Kaplan taking the money to her home (T 392-395).

Fran Kaplan, who was cashier at Plato's from September 1977 until May 1979 (T 521-523), testified to the mechanics of how the income was handled and the receipts were tabulated (T 524-528). When patrons would arrive, the cashiers would take their money and fill out door register receipts (T 524). Thereupon, when Plato's closed for the evening, she would sit down with Levenson, Gordon and the Grippos and would tabulate the evening's receipts, deduct the daily expenses and arrive at a net (T 524-525).

Kaplan would then take the money and the door register sheets home with her, separate the money by denominations and enter the amounts from a summary sheet into a diary (T 526-527). On Mondays, Gordon came to her apartment, separated the money into three piles, took the money and the diary to the Tuesday meetings with Levenson and Pernice and wrote out a bank deposit slip for $10,000. The weekly gross from which the deposit and expenses were subtracted was between $20,000 and $30,000 (T 533-540).*

On cross-examination, Kaplan admitted that she was fired in May 1979, but denies that there was any basis for the theft charges leveled against her at the time (T 549-558). She admitted, however, that when she sued Plato's

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* On cross-examination, she admitted that funds also were set aside each week for construction costs and expenses and she kept a particular portfolio of records for the weekly construction bills that were being incurred and paid for in cash (T 703).

subsqeuently, they counterclaimed against her for substantial thefts (T 594-602).

Internal Revenue Agent William Davidson testified to having conducted an audit on Plato's Retreat commencing in July 1979 (T 862). During the audit being conducted on October 30th, 1979, codefendant Feinberg, Plato's accountant ,told him that Plato's was a tax-exempt corporation (T 871). He attemtpeed to contact the Tax Exempt Division within the I.R.S. and could find no record of Plato's having filed for tax exempt status (T 871-872).* At the nevt audit, conducted on November 27th, 1979, Feinberg prepared regular, not tax-exempt returns for Plato's (T 873).

On May 27, 1980, at a subsequent audit, Anne Grippo handed him an envelope containing petty cash invoices and summary sheets showing an executive and clerical payroll. These summary sheets, which he had never seen before, showed figures far in excess of those represented in the bang deposits upon which the audit previously had been conducted (T 896-903). The next day, when he looked for his envelope to continue the audit, it was gone (T 904-906). There had been a robbery the previous night and it was suspected that, since various employese had been fired, one of them had taken the manila folder (T 909). When asked about the discrepanies between the summary sheets and the bank deposits, defendant Levenson told him that the figures in the summary sheets were artificially inflated and were being shown to prospective franchisees and investors (T 910). The figures on the bank deposits, however, were the accurate records (T 910-911).

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* On cross-examination, the agent stated that Levenson told him that he was advised by counsel that Plato's was tax-exempt. He admitted that he never checked with Levenson's attorney to corroborate this nor that Levenson was ever aware of his obligation to file for tax exempt status under § 501 of the Internal Revenue Code (T 974-981).

Subsequent to September 23rd, 1980, Davidson was shown certain summary sheets and a red diary seized in the course of executing search warrants on Plato's and the home of Harry Gordon (T 916-924). These records were totally disparate from the records shown to him at Plato's during the course of his various field audits (T 918). Based upon these summary sheets, the agents computed the taxable liability of Plato's and found substantial discrepancies with regard to unreported taxable income and tax liability (T 928-934; 941; 945; 946-950).*

Testifying for the defense, Larry Levenson stated that he was the president, operator and director of Plato's Retreat, Inc., a private non-for-profit corporation chartered by New York State (T 1215). He stated that he was under the impression that Plato's, as a not-for-profit corporation, did not have to file tax returns and that he was told by his attorney that since Plato's had filed for not-for-profit status, it was tax exempt and all monies taken in were used for salaries and expenses and were plowed back into the enterprise. Thus, there were no actual profits and the corporation did not have to file (T 1278).

In addition, he relied upon two individual decisions emanating from civil litigation involvng Plato's in which two New York State Supreme Court Justices held that Plato's was a properly-constituted not-for-profit corporation organized under New York State laws (T 1279-1282; 1285-1289). Based upon these judicial decisions, as well as consultations with his lawyers and accountants, he was reassured in his belief that Plato's was tax exempt because of its non-for-profit status (T 1286). Moreover, in his numerous conversations with Revenue Agent Davidson during the course of the audits of Plato's, he informed the

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* Significantly, however, on cross-examination, Agent Davidson did state that where such monies were plowed back into a tax-exempt entity for capital improvements such as construction, such monies would not constitute net taxable income (T 1035-1036).

agent of his understanding of Plato's not-for-profit corporate status and the agent never disabused him for his belief (T 1279).

Levenson described the history of Plato's from its inception in a small townhouse on 86th Street in Manhattan (T 1217) through its eventual removal to the Ansonia Hotel (T 1219). He described his initial meetings with Frank Pernice, who helped to arrange the construction and rebuilding of Plato's at the Ansonia (T 1225-1231) and Harry Gordon, who helped secure the lease at the Ansonia and arranged financing (T 1226). Eventually, the three came together to mutually operate the enterprise, with Pernice concentrating on construction, Gordon concentrating on business operations and Levenson concentrating on promotional operations (T 1222-1224). The financial arrangement arrived at was for Pernice to receive ten percent of the gross with Gordon and Levenson as equal partners on the remainder of the operation (T 1224).

Levenson described the enormous costs for construction that went into building Plato's both at the Ansonia Hotel and at its present location of West 34th Street (T 1225-1231.) For rebuilding alone, the previous tenants at the Ansonia, the Continental Baths, had left the premises in such a physically disastrous state that it cost Plato's betwen $400,000 and $500,000 in rebuilding for the first year (T 1228).

In addition, once it became apparent that the Ansonia was not a viable place to continue in operation, they began to put aside monies for a building fund to finance and construct new premises, which they now occupy on 34th Street (T 1238-1239). They were putting aside approximately $9,000 per week for construction purposes (T 1241).

Levenson did not dispute Agent Davidson's calculations that the monies received, as calculated from the door register receipts, amounted to some $3,000,000 (T 1232-1233). However, all the money that came in the door at Plato's

was used for operating expenses for the Club and was plowed back into the business, for construction and building expenses, both for the Ansonia and the new 34th Street location. The Club was constantly in construction and rebuilding for two and one-half years and the money put away on a weekly basis was paid in cash directly to the construction people to rebuild the new premises (T 1231-1233; 1234-1235; 1238-1242). The proceeds for Plato's thus were directly plowed back into the business and for capital improvements. No skimming of cash proceeds was engaged in by any of the principals of Plato's (T 1234-1235.)

REASONS FOR GRANTING THE WRIT

The Trial Court's marshalling of the evidence, after affirmatively representing to the contrary, marshalling in a wholly unbalanced manner and erroneously instruction of willfullness was reversible error

It is well-settled that the decision to marshal the evidence is within the discretion of the district court. *United States* v. *Taylor*, 562 F.2d 1345 (2d Cir. 1977). This principle stems from a recognition that the efficacy of marshalling the proof varies greatly from case-to-case. Indeed, Courts have explicitly approved the decision not to marshal upon the grounds that a detailed summary of the factual transactions by the court would have presented risks of omission, over-enumeration, over-simplification and improper emphasis. *See, United States* v. *Bernstein*, 533 F.2d 775, 798-99 (2d Cir. 1976); *United States* v. *Hyde*, 448 F.2d 815 (5th Cir. 1971).

In the instant case, however, the trial court did not merely marshal the evidence in a neutral attempt to assist the jury in assessing the welter of evidence submitted for its consideration. Rather, the trial court, after specifically informing counsel to the contrary, proceeded to de-

liver a four-hour exhaustively detailed point-by-point summary of the government's proof—a summarization delivered in such detail and in such a manner of emphasis as to strongly bolster the governments' proof, denigrate the defense theory of the case and plainly to imply the court's belief in defendants' guilt.

In particular, the trial court committed reversible error in three particular aspects of its charges:

a) it improperly represented to counsel that it would not marshal the evidence, thereby wholly misleading counsel in the preparation of their summations;

b) it marshalled the evidence in a wholly unbalanced manner by emphasizing only the most prejudicial evidence presented by the government; and

c) it denigrated the defense theory of the case by giving an erorneous instruction on willfulness.

A. The Court's Misinforming Counsel as to Marshalling the Evidence.

During the presentation of the defense case, the trial court advised defense counsel as follows:

> The Court: Number one, I hope defense counsel will spare me [the] necessity of having to marshal the evidence. I never marshal the evidence without displeasing counsel, and if you want me to do it, I am afraid you are going to express your displeasure at the conclusion [because] I don't see how it can be marshalled without constituting a summary of evidence that is not going to be [consonant] with the summations. (T 1476)

In this case, however, the trial court inexplicably changed its mind *after* summations, delivering a four-hour charge to the jury which summarized the governments' evidence, and the inferences to be drawn therefrom, in the minutest detail.

Defense counsel, of course, were substantially prejudiced by the trial judge's belated change of mind. Had counsel expected the court to summarize the proof, they would have endeavored to ascertain the precise manner in which it would be done in order both to inform themselves of the court's charge (and to structure their summations accordingly), but, more importantly, to make any objections well known *before* the charge was delivered—when it could be corrected without prejudice to the defendants.

Indeed, an opportunity to object to proposed marshalling is perhaps even more important than an opportunity to object to proposed instructions on the law since marshalling is peculiarly susceptible to criticisms of undue emphasis and unfairness. Once the trial court marshals the facts in a particular manner, defense counsel is virtually precluded from undoing the damage which has been caused thereby.

Under analogous circumstances, in *United States* v. *Wright,* 339 F.2d 578, 580 (9th Cir. 1964), the Ninth Circuit reversed a conviction where a trial court failed to properly apprise counsel of the parameters of its proposed jury charge, thereby preventing him from tailoring his summation to the law (and the facts) as the trial court would instruct the jury:

> "The obvious object of the rule in point is to require the judge to inform the trial lawyers in a fair way what the charge is going to be so that they may intelligently argue the case to the jury." (Citations omitted)
>
> * * * *
>
> Because the court failed to clearly inform counsel of its ruling on his requests, counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent instructions. We cannot say that this did not impair

> the effectiveness of counsel's argument and hence of appellant's defense.

In a similar context, *see, United States* v. *Fincke,* 437 F.2d 856, 858 (2d Cir. 1971) (". . . this alteration of the whole complexion of the case after rather than before summations presented problems[,] for the theory generally applicable to trials . . . is to let counsel know in advance of the summations the rulings to be made—the instructions to the jury [citations omitted]").

The prejudice to defense counsel in the instant case thus cannot be gainsaid. Counsel were completly misled as to the tenor of the court's charge and had no opportunity to address the various factual issues raised in the court's marshalling that, in part, went unraised in the prosecutor's summation. Thus, counsel were at a loss to answer two summaries of the government's case—one by the government (to which they had an opportunity to respond) and one by the court (of which they had no inkling before the fact). The prejudicial impact of his marshalling on their summations thus was enormous.

The significance of closing arguments within the context of a criminal trial is undisputed. As Mr. Justice Stewart observed in *Herring* v. *New York,* 422 U.S. 853, 862 (1975):

> It can hardly be questioned that closing arguments serve to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of the fact that there may be reasonable doubt of the defendant's guilt. *See, In Re Winship,* 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368]).

In the instant case, where they were given no inkling of the trial court's intention to marshal the government's proof, defendants were thus deprived of their fundamental right to properly focus their arguments to the jury as that "last clear chance" to persuade them of a reasonable doubt of guilt.

B. Trial Court's Failure to Marshal the Evidence Fairly.

Once the court undertakes to marshal the evidence, the summary must be fair. In *United States* v. *Levy,* 578 F. 2d 896, 903 (2d Cir. 1978), the Second Circuit observed in this regard:

> The purpose of marshalling the evidence by the trial judge is to provide a fair summary of the evidence, and nothing more; to attain that purpose, the district judge must show strict impartiality. *United States* v. *Light,* 394 F.2d 908, 910-911 (2d Cir. 1968); *United States* v. *Press,* 336 F.2d 1003, 1015 (2d Cir. 1964), *cert. denied,* 379 U.S. 965, 85 S.Ct. 658, 13 L.Ed.2d 559 (1965).

In the interests of fairness, courts have gone so far as to require that even where a defendant presents no evidence, the district court's summary still should attempt to give fair recognition to relevant points raised by the defense in cross-examination, as well as to the general theory of the defense. *See, United States* v. *Alfonso Perez,* 535 F.2d 1362 (2d Cir. 1976).

In the instant case, the summary of evidence given by the district court fell far short of this established standard. On the one hand, it contained a detailed and exhaustive recitation of the most damaging evidence presented by the government. On the other, only cursory references were made to the defense case. Moreover, to compound the error inherent in such a lopsided presenta-

tion, the court perceptibly denigrated the defense case. In fact, as explained more fully *infra*, the court's charge on willfullness effectively usurped the jury's fact-finding function and was tantamount to a directed verdict of guilt.

For example, the court instructed the jury that willful intent may be inferred from the following facts—a second set of records was kept by the defendants which was not shown to the I.R.S. auditors, the defendants made false statements to the I.R.S. auditors, the boutique sales records were systematically destroyed, large amounts of cash were never deposited in bank acounts, and records were removed from the premises of Plato's Retreat in order to conceal them from the I.R.S. At another juncture, and in a similar vein, the court directed the jury's attention to the defendants' failure to give relevant information to the I.R.S. agents during the audit period and the defendants' alleged misinformation to the I.R.S. agents, the use of unorthodox bookkeping methods, and the dealing in large amounts of cash which were never the subject of bank deposits.

In this manner, the court systematically recited each and every prejudicial item embodied in the government's evidence, with little or no countervailing attempt to juxtapose the innocent explanations for the same facts presented by the defense. Such a juxtaposition—which is indispensable to the concept of a balanced, fair marshalling of the evidence—was completely ignored by the court when it was most essential.

A close examination of the entire charge reveals this repeated pattern of elaboration with regard to the government's proof, stressing its most prejudicial aspects, interspersed with only brief mention of the defense contentions. The court's summary of Anne Grippo's testimony is yet another vivid illustration of this improper and unbalanced emphasis. The court reminded the jury that Anne Grippo had testified to a statement made by the defendant Gardon

to the effect that "if anything happens, Larry takes the blame for everything," and, further, that defendant Levenson was present when Gordon made this statement.

Once again, following its narration of Anne Grippo's most damaging testimony, the court merely noted that defendant Levenson had contradicted her testimony, as well as that of her husband and Fran Kaplan in many important particulars. Fairness mandated that the court explain precisely how the defense differed from the Grippo version of events; yet time and again, explication of the facts was done only with regard to the Government's proof.

To make matters worse, in one instance, the court actually suggested its own highly prejudicial inference to be drawn from an ostensibly neutral fact—the length of the I.R.S. audit. The court stated:

> One of the interesting *sidelights* in this case has to do with the almost year-long period it took for the IRS to conduct the audit in this case. *Why? You are entitled to ask yourselves why, and some of the answers can be inferred* from some of the evidence in the case, *I respectfully submit.*
>
> Agent Davidson's testimony, if you accept it, is that his quest for information led into a *wild goose chase.* Levenson's testimony was that he and Davidson had many informal, friendly talks and that Davidson discussed the activities inside Plato's Retreat and that Davidson often played the games in the game room. Davidson denied this.
>
> *Why was there a long audit that took so much time? Your answer to that question, if you can answer it, may help you to decide some of the conflcts in the testimony between Levenson and Davidson,* although Levenson does accept many of Davidson's figures. Only with rsepect to everything else except his arith-

> metic, Levenson disagrees. I leave it to you to accept or reject the testimony and come to decisions justified by your common sense and good judgment. (A 373-74) (Emphasis added)

Once again, the court unmistakably pointed the jury in the direction of the defendants' guilt. Appellants contend that the rhetorical questions posed by the court during this portion of the charge conveyed a communicable disbelief of the defense and thus were highly improper. Furthermore, employment of the phrase "I respectfully submit" was not only inappropriate, but gave the court's "submission" precisely the enhanced significance in the jury's eyes which a judge must scrupulously avoid.

This portion of the charge also typifies the court's all-too-frequent use of language or terminology which, sometimes subtly and at other times overtly, denigrated the defendants and the defense case. Here, the court strongly implied that the defendants led Agent Davidson on a "wild goose chase." On another occasion, when the court referred to the offense with which the defendants had been charged, it stated:

> It [the law] was intended to reach people who were *out and out tax cheats, which is what the government alleges these defendants were.* (Emphasis added)

The characterization "tax cheat" was not only completely superfluous, but was fraught with obvious negative implications toward the defendants. On yet another occasion, the court openly disparaged the defendants, stating:

> You have heard about Plato's Retreat not serving liquor, and it did serve liquor at one time, and when the Alcoholic Beverage Control Board *got after them.* . . . (Emphasis added)

This statement carried the clear message that the defendants had committed a violation of the liquor law.

Denigration of the defense took a multitude of other forms. On the one hand, the court urged the jury to scrutinize carefully the defendants' tax returns introduced into evidence by the government. Yet, the jury was at no time correspondingly instructed to examine the exhibits introduced on behalf of the defendants with care.* The court, also belittled the defense by instructing the jury that 1977 and 1978 were the crucial years for their consideration in light of the fact that the bulk of the documentary evidence introduced by the defense pertained to 1980. Counsel specifically objected upon this basis as well.

Equally egregious was the court's pointed criticism of Levenson's counsel during the charge. Reprimanding him by name, the court stated:

> Now, in summing the case up this morning Mr. Breitbart referred to this lawsuit and he referred to the certificate of incorporation. I believe that it has been urged in behalf of both Gordon and Pernice that they too believe that they had tax exempt status because of what Levenson told them.
>
> *Now, I disagree with what Mr. Breitbart said in recalling* the evidence. He referred to Mr. Davidson's testimony as having been to the effect that a not for profit organization, under a New York law, was equivalent to a tax exempt status. (Emphasis added)

During the exceptions, counsel for Levenson legitimately complained:

> Your Honor, I believe you belittled me three times during your charge to the jury, specifically disagreeing with me in statements that I made, and I believe

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* In fact, counsel for Gordon objected at the conclusion of the charge that the court's physical handling of certain defense exhibits (e.g., throwing them down on the desk) evidenced a distinct disbelief in their evidentiary significance.

> each time that it was done, it was done without reliance on the record.

Levenson's counsel subsequently cited the specific portions of the record upon which he had relied in his closing argument. The trial court, however, explicitly refused to correct its charge on this issue, even in the face of being cited to that portion of the record from which counsel had correctly quoted. Needless to say, the prejudice to defendants—where the trial judge specifically (and incorrectly) singled them out for misstatement of the record—had to be enormous in the eyes of the jury.

As demonstrated, the charge is virtually riddled with countless graphic examples of the court's unfairness and perceptible bias. It is virtually impossible to document every subtle nuance. One last specific grievance, however, must be set forth. In directing the jury's attention to the damaging testimony of Anne Grippo and Fran Kaplan, the court stated:

> Were these ladies truthful and forthright witnesses? Did they tell the truth, notwithstanding the circumstances surrounding their separation from the employment at Plato's Retreat? If you believe their testimony and that of Charles Grippo, *you will go a long way in the direction of resolving the factual issues in this case.* If you disbelieve them and reject their testimony, you will go in an entirely different direction.

Petitioners contend that this instruction was palpably weighted against the defendants. Counsel for Levenson objected that this language effectively charged the jury to convict. He explained that ". . . the different direction was certainly not, in this observer's mind, the even-handed way of giving the jury two alternatives." "Resolution" of the issues invariably suggested that the correct or approved result stemming from belief of the Grippos and Fran Kaplan was a determination of guilt.

The one-sided version which the court gave was thus devastating. Merely by prefacing its one-sided enumeration of the facts with the phrases "if you so find," or "if you believe her testimony," the court failed to rescue this technique from the realm of serious impropriety. Counsel, however, were compelled to sit by silently while the damage was occurring and were powerless to undo it. Despite the recognized difficulties inherent in appellate review of a cold record, this Court is urged to weigh the inevitable prejudice of such one-sided marshalling upon an obviously impressionable jury instructed to accept unquestionably the law from the trial judge as he delivered it to them. *See, Bollenbach* v. *United States,* 326 U.S. at 612 ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word.").

C. Trial Court's Misstatement of the Defense Theory of the Case

There can be no doubt that a defendant in a criminal case is entitled to have his theory of defense presented to the jury for their consideration. And, to that end, the jury must be fairly and accurately instructed, on request, of a theory of defense which has any foundation in the evidence "no matter how weak or incredible" that position may appear to the trial court. *United States* v. *Alfonso Perez,* 535 F.2d 1362 (2d Cir. 1976); *United States* v. *Platt,* 435 F.2d 789 (2d Cir. 1970); *United States* v. *O'Connor,* 237 F.2d 466 (2d Cir. 1956).

Otherwise, the judge usurps the fact-finding function of the jury and, as stated in *Strauss* v. *United States,* 376 F.2d 416, 419 (5th Cir. 1967):

> he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant.

Here, the trail court impermissibly failed to submit defendants' requested theory of defense to the jury, substituting instead, its own far-less tenable notion of defense, which incorrectly espoused defendants' position. While this intolerable interference in the fact finding process alone deprived defendants of a fair trial, the situation was exacerbated by erroneous rulings on other matters which went directly to the defense and by a charge so replete with reiterations of evidence favorable to the government that it amounted to improper advocacy on the court's part.

The government's theory of prosecution was that large sums of money were systematically diverted from the gross cash receipts of Plato's Retreat to the personal use of defendants Levenson, Gordon and Pernice. The actual amount of what the prosecution described as "skimmed" money was calculated, in essence, by subtracting from the cash receipts the sums deposited in bank accounts along with the amounts reported as day-to-day cash expenses on Plato's corporate tax returns. By this method, the government contended that for fiscal year 1978, Plato's Retreat did not report or pay corporate taxes on approximately $456,000 (Count Two). The government further urged that this sum was split among the three defendants, who evaded personal income taxes by not reporting their proportional shares of their personal returns for calendar years 1977 and 1978 (Counts Three through Eight).

While the indictment contained no counts specifically charging either a corporate or individual evasion for years other than those described above, the government, employing calculations similar to those described, theorized a conspiracy to commit income tax evasion for the period 1977 through 1980 (Count One).

The defendants did not seriously take issue with the prosecution's *figures* as to "unreported" corporate income. What was vigorously contested, however, was the *disposi-*

tion of the "unreported" income and the "willfullness" of any failure to pay appropriate taxes on the sums in issue.

More specifically, the defense position was that no money was "skimmed" or improperly appropriated to the defendants' personal use. Rather, the monies in issue were reinvested in the business in the form of capital expenditures for construction, renovation and decorating of the business premises. Moreover, defendants believed that since Plato's Retreat was a duly incorporated not-for-profit corporation under New York law, those "profits" —which were, in point of fact, plowed back into the business for construction, etc.—were not subject to taxes.

Th defense position was succinctly stated in an oral request to charge made on behalf of all defendants:

> If your Honor is going to charge that a not for profit corporation is not a tax-exempt corporation, which is a correct statement of law, and I have no quarrel with it, I would ask your Honor to also charge, to balance it, "But if the defendants believed that since they had a not for profit corporation they were not liable to pay federal income taxes if they plowed back the money into the corporation, then they are not guilty of tax evasion.

The necessary foundation in the record for submission of such a defense to the jury was apparent to the trial judge for he made it clear that the requested instructions would be given. For example, the certificate incorporating Plato's as a not-for-profit corporation under New York law and two New York State Supreme Court decisions recognizing Plato's not-for-profit status were entered into evidence. Levenson testified, in substance, albeit without a great deal of sophistication, that he had been advised by counsel that monies taken in by a not-for-profit corporation which "were used for salaries and expenses and

were put back in the place to build the place and put things in" were not taxable. And finally, Levenson testified that hundreds of thousands of dollars, which the government claimed had been siphoned off to the pockets of the defendants, had, in fact, been paid in cash to contractors for construction, renovation and decoration of the physical plant. Indeed, the cash construction costs in 1980 were approximately $9,000 per week. This figure was supported by the introduction of cash disbursement memoranda that had been seized from defendant Gordon's home.

While no documentary evidence was offered to elucidate Levenson's testimony that $7,000-$8,000 per week had been spent, in cash, in the earlier years, Levenson did enumerate the capital improvments which had been paid for by cash during the first years of operation. In addition, Fran Kaplan, a government witness, testified that, in those years, as a bookkeeper for Plato's, she had in her possession a manila folder of receipts for cash disbursements for construction work at the premises.

Thus, the trial court was eminently correct in its original determination to submit the defense theory as requested.

However, for reasons unexplained, the trial court not only failed to present the charge on the theory of defense as appropriately requested, but supplied instead an unrequested, untenable "defense" theory of its own, in effect directing a verdict against defendants.

Rather than put before the jury defendants' proffered defense that they believed that income to be non-taxable to a not-for-profit corporation if used for the payment of capital and construction expenses in relation to the busines, the court instead defined the crucial issue as follows:

> The issue is: Did Levenson, did Gordon, did Pernice have a bona fide belief in the *tax exempt status of Plato's Retreat?*

As this obviously was not the posture upon which defendants had tried the case to the jury, exception was taken as follows:

> Your Honor, in giving the defense contentions, I feel misstated the defense econtentions completely. The defense contention, as I believe I stated it, has always been that the defendants believed that a not for profit corporation, where funds or income was used for the purpose of construction in relation to the business, that that money which would otherwise be profit was not taxable. I would suggest that your Honor has created a defense which we did not put forward and then proceeded to demolish the defense that we did put forward and did not state our actual defense.

Nevertheless, in a supplementary charge, the court reiterated the erroneous delineation of the defendants' theory of defense. But the court went even further, making it absolutely clear to the jurors that on the critically important issue of "willfulness," a finding in favor of the defendants was predicated upon acceptance of the notion that the accused believed that Plato's Retreat had a tax exempt status. As the court put it:

> Now, on the question of willfulness, the defendants contend that they believed, mistakenly but honestly, that Plato's Retreat was tax exempt. The government, on the other hand, challenges the credibility of Mr. Levenson's testimony on this point.
>
> Now, whether you accept the government's version or the defense version is entirely up to you.

The consequence of these instructions was to inject into the case a wholly irrelevant factual issue foreordained to be resolved against the defendants, especially where the court took great pains to point out repeatedly that, as

a matter of law, neither the certificate of incorporation as a not-for-profit corporation, nor the decisions of the state court judges, could confer exemption from federal taxes on Plato's Retreat. There was little likelihood that the jury would accept defendants' argument that this notorious "swinger's club" honestly believed itself to be totally tax exempt in the same way as a religious or charitable organization might be.

But, notwithstanding the likelihood of success of the "defense" formulated by the court's instructions, that posture was simply not defendants' true defense. The crucial aspect of defendants' position was not the perceived tax status (exempt or non-exempt) of Plato's Retreat but, rather, the use and disposition of the concededly untaxed income. Accordingly, it was urged that the defendants believed that, as a not-for-profit corporation (a status overwhelmingly supported by the evidence), the use to which the specific monies was put rendered those monies—that income—non-taxable.

By limiting the jury's consideration to the single issue of belief in an overall tax exempt status, the trial court effectively directed a verdict against defendants on their actual contentions by removing them from possible jury assessment. All the evidence as to the not-for-profit status of Plato's and all the testimony and documentary proof as to the disposition of the untaxed monies was thus rendered nugatory as were counsel's supporting arguments.

Once the jury, presumably following the only instructions on the subject that they received, accepted (as they apparently did) the government's version—i.e., once the jury rejected the idea that defendants believed Plato's to be wholly tax-exempt—the issue of "willfulness" was foreclosed, the result being that the fact-finders need not further consider those additional factors necessary to determine the viability of the defendants' actual defense.

Accordingly, the jury's determination on "willfulness," of necessity, would have been adverse to defendants even if the jurors had concluded, in complete accord with the defense and as the evidence would have allowed, that the sums in issue had been reinvested for construction purposes and defendants honestly believed that Plato's not-for-profit status resulted in no taxes being due on those funds which had been so expended.

As noted in *Strauss* v. *United States*, 376 F.2d 414 (5th Cir. 1967):

> The jury did not have to believe the defense, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.

Here, the jurors may not have believed the defense asserted, but they should have been given the opportunity to consider it. Denial of that opportunity deprived defendants of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
January 29, 1982

Respectfully submitted,

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Appendix

Appendix A, Order and Judgment of Affirmance.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and eighty-one.
Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges,

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
Nov 30 1981
A. DANIEL FUSARO, CLERK

81-1281
1282
1283
1284

UNITED STATES OF AMERICA,

Appellee,

v.

LARRY LEVENSON, HARRY GORDON, FRANK PERNICE, and ALAN FEINBERG,

Defendants-Appellants.

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed.

1. Appellants Pernice, Levenson, Gordon, and Feinberg assert that Judge Palmieri overstepped the boundaries of impartiality by asking certain questions of the witness Donald Salzman. The record reflects that he asked a series of questions bearing directly on the issues arising out of Salzman's testimony and to clarify the subject matter—the attendance of certain persons at a meeting, the circumstances under which a particular document was written, and so forth. It is well-settled that a district judge has the right to ask clarifying questions to assist the jury in the evaluation of the matter under consideration. *United States* v. *Lamont,* 565 F.2d 212, 220 (2d Cir. 1977), *cert. denied,* 435 U.S. 914 (1978); *United States* v. *Bernstein,* 533 F.2d 775, 796 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976); *United States* v. *Natale,* 526 F.2d 1160, 1170 (2d Cir. 1975), *cert. denied,* 425 U.S. 950 (1976). There was nothing improper about Judge Palmieri's conduct.

2. Appellants state that Judge Palmieri should not have interrupted the summation of appellant Levenson's counsel to clarify for the jury that a "not-

for-profit" status under state law could not be equated with a "tax exempt" status pursuant to federal law. Judge Palmieri only interjected his brief statement after appellant Levenson's counsel had made potentially confusing comments concerning Levenson's purported belief that Plato's Retreat had not been required to pay taxes. In making his clarifying remarks, Judge Palmieri was properly attempting to "spear a red herring" introduced by defense counsel. *United States* v. *Cheung Kin Ping,* 555 F.2r 1069, 1073-74 (2d Cir. 1977).

3. Appellants contend that the sentences they received were excesive. Levenson, Gordon, and Pernice each received sentences of eight years imprisonment and fines of $55,000, $55,000, and $40,000 respectively. Appellant Feinberg received a four-year term of imprisonment and a $10,000 fine. All appellants were taxed with costs of prosecution. Generally, when a federal district judge does not rely upon any materially inaccurate information and imposes a sentence within the statutory maximum, the sentence is not subject to review. *See, e.g., Dorszynski* v. *United States,* 418 U.S. 424 (1974); *United States* v. *Perry,* 643 F.2d 38 (2d Cir. 1981); *United States* v. *Vasquez,* 638 F.2d 507 (2d Cir. 1980). Judge Palmieri had sufficient evidence of appellants' continuing criminal conduct before him to reach a reasoned decision. Evidence was presented which indicated, *inter alia,* that appellants filed false tax returns, gave inaccurate records to IRS auditors and concealed business records. Moreover, the amount of taxes involved, both corporate and personal, was well in excess of one and one-half million dollars. Since the sentences were within the statutory maximum, we will not disturb them.

4. Appellant Feinberg claimed that his conviction on the substantive tax evasion count was inconsistent with his acquital on the conspiracy count. Therefore, he asserts, his conviction should be reversed. It is a well-settled principle of law that inconsistent verdicts are the jury's principle of law that inconsistent verdicts are the jury's prerogative and are not grounds for reversal. *See, e.g. United States* v. *Berardi,* 629 F.2d 723, 729 (2d Cir.), *cert. denied,* 449 U.S. 995 (1980); *United States* v. *Ford,* 603 F.2d 1043, 1047 (2d Cir. 1979).

5. The other claims put forth by appellants Pernice, Levenson, Gordon, and Feinberg are equally without merit.

IRVING R. KAUFMAN
IRVING R. KAUFMAN

Wm. H. Timbers
WILLIAM H. TIMBERS

Thomas J. Meskill
THOMAS J. MESKILL, Circuit Judges.

Appendix B, Constitutional Provisions and Statutes Involved.

Constitutional Provisions:

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes:

Title 26 U.S.C. Section 7201:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 U.S.C. Section 7206:

Any person who—

(1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Opposition

Supreme Court, U.S.
FILED
APR 6 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-1432 and 81-1507

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY LEVENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ALAN FEINBERG

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the charge to the jury was fair, impartial, non-prejudicial and complete.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 3

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Loveless v. *United States*, 260 F. 2d 487 5

Quercia v. *United States*, 289 U.S. 466 4

Spies v. *United States*, 317 U.S. 492 7

United States v. *Cardall*, 550 F. 2d 604, cert. denied, 434 U.S. 841 4

United States v. *Clarke*, 468 F. 2d 890 6

United States v. *Kelly*, 349 F. 2d 720, cert. denied, 384 U.S. 947 4

United States v. *Lyles*, 593 F. 2d 182, cert. denied, 440 U.S. 972 4

United States v. *Newson*, 531 F. 2d 979 6

United States v. *Tyminski*, 418 F. 2d 1060, cert. denied, 397 U.S. 1075 4

Wright v. *United States*, 339 F. 2d 578 5

Statutes and rule:

18 U.S.C. 2 2

18 U.S.C. 371 2

Page

Statutes and ruie—Continued:

26 U.S.C. 7201 2
26 U.S.C. 7206(1) 2
Fed. R. Crim. P. 30 ..... 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1432

LARRY LEVENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 81-1507

ALAN FEINBERG

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 26-29) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1981. The petition for a writ of certiorari in No. 81-1432 was filed on January 29, 1982. The petition for a writ of certiorari in No. 81-1507 was filed on February 10, 1982, and was accordingly out of time pursuant to Rule

20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners Larry Levenson, Harry Gordon, and Frank Pernice were convicted on one count of conspiring to evade corporate income taxes of Plato's Retreat, Inc., from September 22, 1977, until September 30, 1980, in violation of 18 U.S.C. 371; one count of attempting to evade corporate income taxes of Plato's Retreat, Inc., for the fiscal year ended September 30, 1978, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; and two counts each of attempting to evade individual income taxes for calendar years 1977 and 1978, in violation of 26 U.S.C. 7201 (Tr. 2073-2074). Petitioner Feinberg was convicted on one count of aiding and abetting the attempted evasion of corporate income taxes and was acquitted on the conspiracy count. Petitioners Levenson and Gordon were also convicted on three counts of filing false Employer's Quarterly Tax Returns for the quarters ended December 31, 1979, March 31, 1980, and June 30, 1980, in violation of 26 U.S.C. 7206(1) and 18 U.S.C. 2. The district court sentenced petitioners Levenson, Gordon and Pernice to fines and prison terms totalling eight years.[1] Each was also placed on five years' probation upon his release from prison. Petitioner Feinberg was fined $10,000 and sentenced to a prison term of four years. The court of appeals affirmed (Pet. App. 26-29).[2]

In summary, the government's proof at trial showed that for three years Larry Levenson, Harry Gordon, Frank Pernice, and Alan Feinberg surreptitiously extracted huge

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[1]Levenson and Gordon were fined a total of $55,000 each, and Pernice was fined a total of $40,000.

[2]"Pet." and "Pet. App." refers to the petition in No. 81-1432.

amounts of cash from the gross receipts of Plato's Retreat by means of a massive skimming operation. The skimmed monies—about $2.3 million over the life of the scheme—were split on a weekly basis among Levenson, Gordon, and Pernice. Feinberg, the accountant for Plato's Retreat, aided the skimming operation by preparing and filing delinquent and fraudulent corporate tax returns. The defendants then aggravated their wrongdoing by orchestrating a cover-up during a year-long audit by the Internal Revenue Service. During the cover-up, they concealed the true records of Plato's Retreat from the IRS auditors and repeatedly lied to the agents about a variety of matters, including, for example, the nature and whereabouts of the true records of Plato's Retreat and the payment of cash to employees.

The evasion and cover-up were conclusively established by documentary evidence which showed the true gross receipts of Plato's Retreat,[3] the testimony of the IRS agents who conducted the audit,[4] the testimony of the managers of Plato's Retreat and other employees,[5] and testimony before the grand jury.[6]

Petitioners contended that their actions were based on their belief that Plato's Retreat was a tax-exempt, not-for-profit corporation (Tr. 1216, 1235-1239, 1278-1289). They also contended that the testimony of major prosecution witnesses was not credible (*e.g.*, Tr. 549-558, 594-602, 1715-1719, 1768-1778, 1813-1814, 1816-1818, 1824-1825).

ARGUMENT

1. Petitioners argue that the trial court's charge to the jury was improper. Their first complaint is that the court

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[3]GX 1, 15, 16, 20, 25, 27, 67, 70, 71, 72, 74, 101.

[4]Tr. 862-864, 867-894, 896-900, 903-904, 909-915, 920-959, 1491-1493.

[5]Tr. 172-174, 182-188, 190-192, 194-208, 211, 213-214, 217-218, 233-238, 240-242, 244-246, 248, 250-252, 254-256, 266, 396, 523-538, 541, 544-547, 556-560, 571-574.

[6]Tr. 1181-1193, 1195-1197, 1200-1201, 1206, 1208-1212.

misled them by marshalling the evidence after indicating that it would not do so (Pet. 9-12). In fact, while the court properly incorporated references to the evidence in its charge in order to crystallize the issues that the jury had to decide, it did not undertake a detailed summarization of the evidence (Tr. 1858-1978, 2036-2041, 2049-2063).[7] Thus, its action was not inconsistent with the statement that the court did not intend to marshal the evidence.[8]

Even if the judge's references to evidence did constitute "marshalling," petitioners would not be entitled to relief in the absence of a showing of prejudice. *United States* v. *Tyminski*, 418 F. 2d 1060, 1062 (2d Cir. 1969), cert. denied, 397 U.S. 1075 (1970); see *United States* v. *Lyles*, 593 F. 2d 182, 186 (2d Cir.), cert. denied, 440 U.S. 972 (1979); *United States* v. *Cardall*, 550 F. 2d 604, 607 (10th Cir. 1976), cert. denied, 434 U.S. 841 (1977); cf. *Quercia* v. *United States*, 289 U.S. 466 (1933). Petitioners' only claim of prejudice is that they were deprived of an opportunity to address issues raised in the court's references to evidence. Petitioners have identified no specific issue that they were precluded from addressing, however, and no respect in which their arguments would have been materially different had they anticipated that the court would allude in its charge to the evidence. Furthermore, the references made to the evidence were entirely fair and impartial (see pages 6-11, *infra*) and, hence, not prejudicial.

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[7]Indeed, the record reflects that the trial judge was surprised that defense counsel would even suggest that his references to the evidence constituted "marshalling" (Tr. 1892, 1991).

[8]See *United States* v. *Kelly*, 349 F. 2d 720, 777 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). In *Kelly*, the court of appeals rejected a claim of prejudicial error arising out of a trial judge's alleged breaking of a promise not to mention evidence or the facts of the case in his charge. The trial judge was alleged to have broken his promise with respect to aspects of the case referred to in the charge by giving a brief description of the factual background necessary to make his instructions intelligible.

In addition, advance notice of these unbiased references was not necessary to permit defense counsel to argue intelligently to the jury. Cases in which courts have found impairment of a defense counsel's ability to make an appropriate closing argument have involved failure to advise counsel as to instructions on the law. See, for example, *Wright* v. *United States*, 339 F. 2d 578 (9th Cir. 1964); *Loveless* v. *United States*, 260 F. 2d 487 (D.C. Cir. 1958). Such instructions, which are binding on the jury, determine the legal theories on which defense arguments may be based. A lack of advance information may therefore mislead counsel into foregoing an argument based on a particular theory or into making an argument based on a theory rejected by the court. No such danger exists with respect to unbiased references by the court to evidence, since the jury is not bound to accept the court's recollection. Nothing the court may say precludes defense counsel from arguing all the factual issues in the case and calling to the jury's attention all the evidence that counsel considers important.

Finally, petitioners are not entitled to know with precision before the charge is given the references the trial court intends to make concerning the evidence, or to propose that the evidence be summarized in a particular manner. A defendant is permitted to request instructions and to obtain information as to instructions pursuant to Fed. R. Crim. P. 30.[9] That rule does not guarantee defendants advance notice of all comments a trial judge intends to make. Rather, the court is required to advise counsel only of its

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[9]The rule states, in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury * * *.

rulings on requested instructions. *United States* v. *Clarke*, 468 F. 2d 890, 892 (5th Cir. 1972); *United States* v. *Newson*, 531 F. 2d 979, 982 (10th Cir. 1976). In addition, by its terms Rule 30 only provides for requests for instructions "on the law." It does not require the court to inform counsel of the evidence to be referred to in the charge or to rule on requests to summarize evidence in accordance with a defendant's preferences. Consequently, even if petitioners had been informed that the trial court intended to refer to evidence in its charge, they would not have been entitled to know precisely to what evidence the court would refer. Under these circumstances, any claim of prejudice based on an asserted loss of an opportunity to respond to the court's references to the evidence is completely speculative.

2. Petitioners' next contention is that the charge contained "a detailed and exhaustive recitation of the most damaging evidence presented by the government" but "only cursory references * * * to the defense case" (Pet. 12). Petitioners are incorrect. The charge was balanced carefully and precisely, even though the prosecution's evidence was overwhelming. The court emphasized that its references to the evidence during the charge were not exhaustive and that the jury should consider all of the evidence (Tr. 1859-1860). The jury was reminded repeatedly that it was to find the facts, not the court (*e.g.*, Tr. 1859, 1861, 2037-2038). Finally, the court admonished the jury to remember that "it is the quality, not the quantity, of the proof that counts" (Tr. 1956-1957).

Petitioners attempt to show that the charge was unfair by pointing to a number of examples. Analysis of even the selected examples, however, demonstrates that the charge was not unfair. For instance, petitioners see unfairness in the court's instructions on the evidence from which willful

intent might be inferred (Pet. 13).[10] These instructions correctly state the law on the sort of evidence from which willfulness may be inferred in a tax evasion case. See, *e.g.*, *Spies* v. *United States*, 317 U.S. 492, 499 (1943). The instructions correctly informed the jury that drawing an inference of willfulness from facts such as those enumerated by the court was merely permissive (Tr. 1914). It was clear, furthermore, that the jury, not the court, was to determine whether the facts existed from which an inference of willfulness could be drawn (Tr. 1914, 1927). The court added further balance to this aspect of its charge with a specific reference to petitioner Levenson's testimony (the only petitioner who testified) on the issue of willfulness (Tr. 1939).

---

[10]The charge states in pertinent part (Tr. 1914, 1926-1928):

> Wilful intent may be inferred, for example, from the fact, if you so find it, that a second set of records was kept by the defendant which was not shown to the IRS auditors or the fact, if you so find it, that the defendants made false statements to the IRS auditors, or from the fact, if you so find it, that the boutique sales records were systematically destroyed or the fact, if you so find it, that large amounts of cash were never deposited in bank accounts, or from the fact, if you so find it, that records were removed from the premises of Plato's Retreat in order to conceal them from the IRS, or from any other conduct that you find was likely to mislead and conceal, providing such conduct was designed to cheat and defraud the government out of its revenues.
>
> * * * * *
>
> In considering whether the defendant wilfully attempted to evade taxes you must determine what was in his mind, what motivated his conduct. You may consider in this connection the following facts that are in evidence before you, if you find that evidence is believable:
>
> Number one, the defendant's failure to give relevant information to the IRS agents during the audit period and the defendant's alleged misinformation to the IRS agents.
>
> Two, the use of unorthodox bookeeping methods.

Another of petitioners' examples is the court's reference to damaging aspects of the testimony of government witness Anne Grippo (Pet. 13-14). Petitioners complain (*id.* at 14) that after referring specifically to Grippo's testimony, the court noted only that petitioner Levenson had contradicted her testimony "in many important particulars" (Tr. 1958). Petitioners are ignoring the fact that the court focused explicitly on their claim that Mrs. Grippo was lying. It instructed the jury to determine "was she vindictive, was she lying, did she make up a tissue of falsehoods to put her former employers in trouble?" (Tr. 1960). The court discussed in detail factors bearing on the credibility of Ann Grippo and another prosecution witness, Fran Kaplan (Tr. 1960-1963).[11] The charge was balanced and fair.

And three, the dealing in large amounts of cash which were never the subject of bank deposits.

Ask yourselves, as you consider each of these charges against each one of the individual defendants Levenson, Gordon and Pernice, was there a bad purpose or evil motive to disobey or disregard the tax laws? Was he simply careless, negligent or stupid? These are matters solely for your determination based upon the evidence in the case.

This law, ladies and gentlemen, was not intended to reach people who are not tax cheats. It was not intended to reach people who made bona fide mistakes or were stupid or careless. It was intended to reach people who were out and out tax cheats, which is what the government alleges these defendants were.

And it is up to you, and you alone, to decide what the true facts were and whether the charges are sustained.

In this connection, I charge you that you cannot infer a willful state of mind from the understatement of income alone. However, you may consider evidence of such an understatement together with any other evidence of the nature of the defendant's conduct and the circumstances surrounding it in determining his state of mind.

[11]The court noted that "both left their employment [with Plato's Retreat] under conditions of considerable emotional stress"; that both

As another example of alleged unfairness, petitioners point to the instruction that an inference might be drawn from the length of time taken to audit Plato's Retreat (Pet. 14-15). A reading of the language quoted by petitioners leaves no doubt that the judge's comment was fair. It is reasonable to infer that an audit might be prolonged by efforts to hide income and hinder the IRS. While noting such a possibility, the court also noted petitioners' explanation that the investigation was conducted on an informal, friendly basis. Moreover, the judge properly left the drawing of any inference to the jury. Thus, petitioners' assertion that this portion of the charge evidences unfairness or a lack of balance is plainly unfounded.

Petitioners also argue that the use of the term "tax cheats" in the charge created negative implications about them (Pet. 15).[12] The term was not used to describe petitioners, however. It was used to emphasize that the law under which petitioners were charged was not aimed at innocent persons who made mistakes, but at deliberate violators. The court did not say petitioners were "tax cheats"; it said that they were *accused* of being tax cheats—that is, willful violators of the tax law. Quite properly, the determination of the issue was expressly left to the jury (Tr. 1927).

Petitioners further complain about the court's reference to Plato's Retreat's difficulties with the Alcoholic Beverage Control Board (Pet. 15). The reference (Tr. 1944) was part of a discussion of two state court decisions on the corporation's not-for-profit status, which were relevant to the defense claim that the defendants had not acted willfully. The Alcoholic Beverage Control Board was mentioned only to show how the state court disputes arose.

"acknowledge themselves * * * to be accomplices"; and that neither has been prosecuted for nonpayment of taxes (Tr. 1959, 1961, 1963).

[12]See note 10, *supra*.

Petitioners wrongly assert that the court was unfair in instructing the jury that 1977 and 1978 were the crucial years for their consideration, because the bulk of the documentary evidence introduced by the defense related to 1980 (Pet. 16). Petitioners overlook the fact that the court's statement was correct, because the 1977 and 1978 tax years were the years that were the subjects of the substantive violations charged in the indictment.

Another claim of unfairness relates to the court's statement that it disagreed with a statement made by petitioner Levenson's counsel during his summation (Pet. 16-17). The court obviously felt compelled to advise the jury of its recollection of the evidence. However, it also advised the jury of petitioners' position and reminded the jury again that the matter was one for it to decide (Tr. 1943-1944). Thus, the court did not belittle defense counsel, as petitioners assert; it instead kept counsel's position before the jury.

Petitioners' final example of claimed unfairness relates to a portion of the judge's instruction on the credibility of government witnesses Ann Grippo and Fran Kaplan (Pet. 17). After an extensive discussion concerning factors to be used in evaluating those witnesses' credibility, which included numerous reasons to question their testimony, the court said (Tr. 1963):

> If you believe their testimony and that of Charles Grippo, you will go a long way in the direction of resolving the factual issues in this case. If you disbelieve them and reject their testimony, you will go in an entirely different direction.

Petitioners argue that the quoted language effectively charged the jury to convict. To the contrary, the instruction informed the jury that the testimony, if accepted, obviously would lead them in one direction and, if rejected, would

lead them in another direction. If the instruction can somehow be construed as suggesting that conviction was an "approved result," any such suggestion was so subtle as to be harmless, especially since it constitutes one sentence in a charge of over 100 pages.

3. Petitioners' last contention is that the court misstated their theory of defense (Pet. 18-24). Counsel for petitioners argued at trial that petitioners mistakenly believed that they did not have to pay taxes on income earned by a not-for-profit corporation that was reinvested in the business (Tr. 1723-1725, 1760, 1778, 1802-1810, 1826). Petitioners complain that this defense was not explained in the charge. The jury was charged as follows (Tr. 1944):

> The issue is: Did Levenson, did Gordon, did Pernice have a bona fide belief in the tax exempt status of Plato's Retreat?

Petitioners' complaint is ill-founded. The charge included numerous instructions encompassing the defense theory. The jury was instructed to acquit petitioners if it believed that petitioners misunderstood their obligation to pay taxes, or were negligent or stupid (Tr. 1911, 1926, 1927). Petitioners were entitled to no more.[13]

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[13]It should be noted also that the court both quoted from and accurately paraphrased petitioner Levenson's testimony on the defense theory (Tr. 1942-1943). The charge states, in pertinent part:

> The defendant Levenson has testified that he believed that Plato's Retreat was a not-for-profit corporation and that a not-for-profit corporation was exempt from the payment of taxes. He testified in substance that he was told by his attorney that "We had filed for a not for profit corporation and that all the monies taken by Plato's Retreat were used for salaries and expenses and were put back in the place to build the place and put things in and there was no actual profit. It was a not-for-profit corporation that didn't have to file a tax return."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

The questions put by his attorney and answered by him were as follows:

"Q Was the nature of the lawsuit"—this is a reference to the New York State lawsuit in connection with the serving of alcoholic beverages on the premises.

"Was the nature of the lawsuit and the decisions which Judge Palmieri is holding discussed with Mr. Gordon and Mr. Pernice?

"A Yes, many times.

"Q Would you say that in addition to telling Mr. Davidson as to what you believed the tax status to be you discussed it many times before the lawsuit with Mr. Gordon and Mr. Pernice?

"A Yes, sir."

DOJ-1983-04